Supreme Court, U.S.
FILED
SEP 6 1996
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No. 95-9075

In The

Supreme Court of the United States

October Term, 1995

LEROY HENDRICKS,

Cross-Petitioner,

v.

STATE OF KANSAS,

Cross-Respondent.

On Writ Of Certiorari To The Supreme Court Of Kansas

BRIEF OF CROSS-RESPONDENT

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QUESTIONS PRESENTED

1. Does the Kansas Sexually Violent Predator Act, Kan. Stat. Ann. § 59-29a01 *et seq.* – which provides for the civil commitment and long-term care and treatment of sex offenders who are found beyond a reasonable doubt both (1) to be suffering from a mental abnormality or personality disorder and (2) to present a continuing danger to society through a likelihood of committing future sexually violent offenses – impose criminal punishment?

2. Does civil commitment under the Act "punish" such sex offenders a second time for their crimes in violation of constitutional double jeopardy principles?

3. Does the Act violate constitutional *ex post facto* principles when applied to sex offenders who committed sexually violent offenses prior to its enactment?

4. Does the Act, by treating the civil commitment of sex offenders differently from the civil commitment of other mentally ill persons, violate equal protection principles?

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OPINIONS BELOW

The March 1, 1996, decision of the Kansas Supreme Court, holding that the Kansas Sexually Violent Predator Act violates substantive due process principles, is reported, 259 Kan. 246, 912 P.2d 129 (1996), and is included in the appendix to the State's petition for a writ of certiorari ("Pet. App."). *See* Pet. App. 1a-59a. Leroy Hendricks' conditional cross-petition in this case raised the four constitutional issues addressed in this brief, none of which were addressed by the plurality and concurring opinions in the Kansas Supreme Court. Only the three dissenting justices addressed these issues on the merits. *See id.* at 47a-55a.

STATEMENT OF JURISDICTION

This Court's jurisdiction to review the final judgment of the Kansas Supreme Court is invoked pursuant to 28 U.S.C. § 1257(a). The Kansas Supreme Court issued its decision in this case on March 1, 1996. Pet. App. 1a. The petition for a writ of certiorari was filed on April 12, 1996, and cross-petitioner Leroy Hendricks filed a conditional cross-petition on May 13, 1996. The Court granted both the petition and the conditional cross-petition on June 17, 1996. 116 S. Ct. 2522 (1996).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *Ex Post Facto* Clause of Article I, § 10, provides that

> No State shall . . . pass any . . . ex post facto Law. . . .

The Double Jeopardy Clause of the Fifth Amendment provides that

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .

The Due Process Clause of the Fourteenth Amendment provides that

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

The Equal Protection Clause of the Fourteenth Amendment provides that

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

The Kansas Sexually Violent Predator Act, Kan. Stat. Ann. § 59-29a01 *et seq.*, is set forth in full at Pet. App. 61a-72a. Although there have been some amendments to the statute subsequent to the proceedings in this case, they are minor and not material to the constitutional issues presented here.

STATEMENT OF THE CASE

The State generally relies on the statement of the case set forth in its opening brief in *State of Kansas v. Hendricks*, No. 95-1649. Factual assertions made by cross-petitioner Hendricks in his opening brief which merit elaboration or correction will be addressed below as necessary.

SUMMARY OF THE ARGUMENT

Statutes such as the Kansas Sexually Violent Predator Act, which provide for the civil commitment and long-term care and treatment of sex offenders who are proven both to be suffering from a mental abnormality or personality disorder and to present a danger to the community, do not create "criminal" proceedings or impose "punishment" for constitutional purposes. Rather, as this Court recognized in *Allen v. Illinois*, 478 U.S. 364 (1986), such statutes serve the dual civil, non-punitive purposes of providing treatment and incapacitating dangerous individuals. For constitutional purposes, the Kansas Act is indistinguishable from the Illinois statute the Court upheld in *Allen*.

In analyzing whether a statute is criminal or imposes punishment, this Court has engaged in a two-step inquiry. *See, e.g., United States v. Ursery*, 518 U.S. ___, 116 S. Ct. 2135 (1996). The first step is to determine whether the legislature labeled or intended the statute to be civil or criminal. If the statute on its face appears to be civil, as Hendricks concedes is true of the Kansas Act, then a presumption arises that the statute is civil for constitutional purposes. A person challenging the legislative label then must demonstrate by "the clearest proof" that the statute nonetheless is so punitive in either purpose or effect that the legislative designation must be disregarded. Hendricks has failed to meet his high burden in this case. Thus, Hendricks' double jeopardy and *ex post facto* claims fail because the Kansas Act is not criminal and does not impose punishment.

Lastly, Hendricks has abandoned his equal protection challenge by failing to argue the merits of that claim – which he alone raised in his conditional cross-petition – in his opening brief. Even had he not abandoned that claim, however, it clearly lacks merit. Applying rational basis review, as this Court historically and consistently has done in equal protection cases regarding classifications involving those with mental conditions, it is obvious that the Kansas Act is based on rational distinctions that derive from the unique circumstances and characteristics of sex offenders. Moreover, the Act withstands even strict scrutiny because it serves the compelling dual governmental interests of treating those with mental conditions while incapacitating them for the protection of the community, and is narrowly tailored to achieve those purposes.

The fundamental question in this case is not whether the States may address the unique problems posed by dangerous, repeat sex offenders with mental abnormalities, but how. Within reason, the Constitution leaves that decision to the States.

ARGUMENT

I. THIS COURT'S CASES ESTABLISH THAT STATUTES PROVIDING FOR THE CIVIL COMMITMENT OF SEXUALLY DANGEROUS PERSONS ARE NOT "CRIMINAL" AND DO NOT IMPOSE "PUNISHMENT" FOR CONSTITUTIONAL PURPOSES

The centerpiece of cross-petitioner Hendricks' brief – on which his double jeopardy and *ex post facto* claims

depend – is the argument that the Kansas Sexually Violent Predator Act ("the Act") should be deemed "criminal" rather than "civil" for constitutional purposes. *See* Brief for Cross-Petitioner 22-36. This Court already has established, however, that state statutes which provide for the civil commitment of sexually dangerous persons with mental conditions for long-term care and treatment are not criminal in nature and do not impose "punishment" for constitutional purposes. *See Allen v. Illinois*, 478 U.S. 364 (1986); *see also Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940) (rejecting due process and equal protection challenges to state "sexual psychopath" law).[1] The Court so held in *Allen* notwithstanding that the Illinois Sexually Dangerous Persons Act and its civil commitment procedures, like the Kansas Act, were triggered only by the commission of a criminal offense, and had many of the procedural safeguards normally associated with criminal trials. The Court should reaffirm in this case that the Kansas Act, which for constitutional purposes is indistinguishable from the Illinois statute in *Allen*, is not a criminal statute and does not impose punishment.[2] Once that proposition is established, there

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[1] Many commentators also have reached the conclusion that sex predator statutes are not "criminal" and do not impose "punishment" for constitutional purposes. See, for example, the articles cited in Brief of Petitioner (No. 95-1649) at 45 n. 29.

[2] Hendricks' facial challenge to the Kansas statute, "is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). *See also Reno v. Flores*, 507 U.S. 292, 301 (1993) (same).

is no constitutional basis for invoking the Double Jeopardy Clause of the Fifth Amendment or the *Ex Post Facto* Clause of Article I, § 10.

A. *Allen v. Illinois*, 478 U.S. 364 (1986), Establishes That Laws Providing For The Involuntary Commitment of Sexually Dangerous Persons Are Civil In Nature

In *Allen v. Illinois*, 478 U.S. 364 (1986), this Court held that commitment proceedings under the Illinois Sexually Dangerous Persons Act were not "criminal" within the meaning of the Fifth Amendment's privilege against self-incrimination. The Court observed that the question whether a statute creates a criminal proceeding "is first of all a question of statutory construction." *Id.* at 368. Pointing out that the Illinois statute on its face declared the proceedings to "be civil in nature," *id.*, the Court nonetheless recognized that "the civil label is not always dispositive." *Id.* at 369. The Court acknowledged that prior decisions had held that if a party challenging the "civil" label provided "the clearest proof" that the statute was so punitive in purpose or effect as to negate the "civil" label, the statute would be deemed "criminal" for constitutional purposes. *Id.* The Court had little difficulty, however, in determining that the Illinois statute was civil in nature, not criminal.

In reaching that conclusion, the Court relied principally on the fact that the Illinois law – like the Kansas Act in this case – provided for care and treatment, not punishment, for persons adjudged sexually dangerous. *Id.* It

is a stated purpose of the Kansas law to provide treatment to sexually violent offenders:

> The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the [general Kansas involuntary civil commitment statute], which is intended to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under [the general Kansas involuntary civil commitment statute], sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure . . . is inadequate to address the risk these sexually violent predators pose to society. The legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, *the treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the [general Kansas involuntary civil commitment statute]*, therefore *a civil commitment procedure for the long-term care and treatment* of the sexually violent predator is found to be necessary by the legislature.

Kan. Stat. Ann. § 59-29a01 (emphasis added). A person committed under the Act must be placed in the custody of the Secretary of Social and Rehabilitative Services in a non-prison environment or, if placed in a correctional mental health facility, must be segregated from the inmate population. § 59-29a07(a). The Kansas Legislature has specifically directed that "[t]he involuntary detention or commitment of persons under this act shall conform to constitutional requirements for care and treatment." § 59-29a09. Furthermore, commitment under the Kansas Act, like commitment under the Illinois statute at issue in *Allen*, is not intended to be for life. Rather, sexual predators committed under the Act may be restrained only "until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large." § 59-29a07(a). Thus, on its face, the Kansas statute manifests a legislative emphasis on the treatment of sex predators in a setting appropriate to achieving that legislative purpose. Indeed, its language negates any claim of punitive intent or effect.

The Court in *Allen* rejected the argument that commitment proceedings are criminal if they are premised on the commission of a sexual offense. In doing so, the Court observed: "That the State has chosen not to apply the Act to the larger class of mentally ill persons who might be found sexually dangerous does not somehow transform a civil proceeding into a criminal one." 478 U.S. at 370. Moreover, the Court pointed out that the State also had to prove that the person suffered from a mental disorder and presented a continuing danger to society. *Id.* at 370-71. Thus, the required proof of antecedent criminal conduct was "received not to punish past misdeeds, but

primarily to show the accused's mental condition and to predict future behavior." *Id.* at 371. Hendricks makes the identical contention that the petitioner in *Allen* made in this respect. *See, e.g.*, Brief for Cross-Petitioner 35 (the Act is criminal because "[c]ommittment [sic] is triggered by the finding beyond a reasonable doubt that a criminal offense has been committed").[3] The Court's reasoning in *Allen*, however, easily dispatches that contention.

Importantly for this case, the Court in *Allen* also rejected the argument that the State's use of procedural safeguards usually found in criminal trials made the proceedings criminal rather than civil. 478 U.S. at 371-72. The Court noted that, "[i]n his attempt to distinguish this case from other civil commitments, petitioner places great reliance on the fact that proceedings under the Act are accompanied by procedural safeguards usually found in criminal trials." *Id.* at 371. Hendricks has made precisely the same argument in this case. *See* Brief for Cross-Petitioner 20 ("the criminal nature of this statute is evidenced by its procedural mechanisms"); *id.* at 35 (the "adjudication is punitive, for the proceeding closely mirrors that of a criminal trial"). In *Allen*, the Court summarily rejected the argument. declaring that, "as we noted above, the State has indicated quite clearly its intent that these commitment proceedings be civil in nature; its decision nevertheless to provide some of the safeguards applicable in criminal trials cannot itself turn these proceedings into

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[3] Strictly speaking, the Kansas Act does not necessarily require proof of a criminal conviction. Either a conviction or charge of a sexually violent offense suffices if the other statutory criteria are met. § 59-29a02(a).

criminal prosecutions requiring the full panoply of rights applicable there." 478 U.S. at 372.

The Court should hold the same in this case. Indeed, the State should be lauded for according those subject to commitment under the Act these additional safeguards which exceed the procedures required under this Court's civil commitment cases. Adopting the rule Hendricks proposes – that the creation of criminal-type safeguards automatically turns a proceeding into a criminal one – would create the perverse incentive for states to provide less rather than more procedural protection when effecting deprivations of liberty in a civil context.

Furthermore, the Court in *Allen* rejected the contention that a punitive purpose was demonstrated by the placement of persons adjudged sexually dangerous in maximum-security institutions that also housed mentally ill inmates. In a passage that could just as easily be describing the Kansas Act and its implementation in this case, the Court observed:

> [T]he State serves its purpose of *treating* rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment. That the Menard Psychiatric Center houses not only sexually dangerous persons but also prisoners from other institutions who are in need of psychiatric treatment does not transform the State's intent to treat into an intent to punish. Nor does the fact that Menard is apparently a maximum-security facility affect our analysis. . . .

Id. at 373 (emphasis original). After pointing out that in *Addington v. Texas*, 441 U.S. 418, 426 (1979), the Court had recognized both *treatment* and *incapacitation* as legitimate, non-punitive state objectives in the mental health context, 478 U.S. at 373, the Court further declared that "Illinois' decision to supplement its *parens patriae* concerns with measures to protect the welfare and safety of other citizens does not render the Act punitive." *Id.* Thus, the Court concluded that the petitioner had not demonstrated that the conditions of confinement were "incompatible with the State's asserted interest in treatment." *Id.*

Lastly, in *Allen* the Court explained that

> Had petitioner shown, for example, that the confinement of such persons imposes on them a regimen which is essentially identical to that imposed upon felons with no need for psychiatric care, this might well be a different case. But the record here tells us little or nothing about the regimen at the psychiatric center, and it certainly does not show that there are no relevant differences between confinement there and confinement in the other parts of the maximum-security prison complex. Indeed, counsel for the State assures us that under Illinois law sexually dangerous persons must not be treated like ordinary prisoners. We therefore cannot say that the conditions of petitioner's confinement themselves amount to "punishment" and thus render "criminal" the proceedings which led to confinement.

Id. at 373-74 (citation omitted). These observations apply literally in this case because Hendricks has failed to identify any evidence in the record indicating that persons

committed under the Act are confined like ordinary prisoners.

It should not matter for constitutional purposes that Kansas has provided for continuing long-term care and treatment following criminal punishment in those relatively few situations where it is found necessary. Although the statute at issue in *Allen* provided for treatment in lieu of criminal punishment, commitment under the statute was "for an indeterminate period," *id.* at 372, and could have extended beyond the length of the criminal sentence the person otherwise would have received. *See id.* at 369-70, 373. In the limited context of sex offenders with mental conditions, the State should not be forced to choose between civil commitment and punishment for offenses against society. The Kansas Legislature reasonably has determined that punishment generally is the appropriate goal while recognizing that some sex offenders suffer from mental conditions which make them a continuing danger to society and therefore appropriate candidates for continuing care and treatment after their punishment has ended.

This Court has never declared that an *Allen*-type statute is the only constitutionally permissible statute for dealing with sexually violent offenders. As explained more fully in Kansas' opening brief in No. 95-1649, in dealing with sex offenders and the problems they present, the States must confront and resolve difficult policy questions that admit of no easy or universal answers. Historically, and with good reason, this Court has accorded considerable respect to the States' choices in crafting, implementing and integrating civil commitment

and criminal justice systems, and it should do so in this case.

Kansas' decision to establish a flexible system, permitting the combination of civil commitment and punishment as determined (with rigorous procedural safeguards) to be appropriate in individual situations, is both reasonable and humane in light of current medical knowledge and firmly established societal notions of individual responsibility and accountability. Most sex predators recognize the difference between right and wrong, and therefore are culpable under the tests for criminal *mens rea* utilized in most jurisdictions. Thus, they deserve to be punished for their conduct and it is appropriate for society to condemn their actions. At the same time, some sex predators do suffer from identifiable mental conditions or disorders that both distinguish them from the vast majority of citizens who do not commit such offenses and with treatment, may permit them to lead relatively normal lives in the future without committing sexual offenses against children and women. Indeed, the prospect of commitment until they no longer suffer from such conditions and therefore present no danger to the community may well motivate sex predators to engage in meaningful participation in treatment programs when they otherwise might decline to do so, instead just serving out their term of imprisonment secure in the knowledge they will be released whether or not they have come to grips with their psychological problems.[4]

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[4] Hendricks refused all offers of treatment while in prison for his most recent offenses, in part because he did not want to forgo the $0.45 to $1.05 per day he might otherwise make by working full time within the penitentiary. Joint Appendix

For all of these reasons, the Court's reasoning in *Allen* regarding the Illinois Sexually Dangerous Persons Act supports the constitutionality of the Kansas Sexually Violent Predator Act, and Hendricks (and the *amici* supporting him[5]) fails to demonstrate to the contrary. The Kansas Act on its face creates a civil commitment proceeding and requires treatment. *See* Kan. Stat. Ann. §§ 59-29a01, 59-29a09. In addition, as demonstrated below, the record reflects that persons committed under the Act are provided a meaningful treatment program, *see, e.g.*, Joint Appendix ("J.A.") 387, 395, 413-14, 422-47, 453-54, and live under a daily regimen considerably more lenient than that imposed on convicted felons in an ordinary prison, or even inmates confined in a correctional mental health facility. *See id.* at 50-65. The fact that such commitment follows criminal punishment does not suffice to alter its civil nature for constitutional purposes.

178-80. Moreover, Hendricks admitted colorfully referring to treatment as "bullshit." *Id.* at 190.

[5] For example, the American Psychiatric Association ("APA") has filed a brief in support of Hendricks that repeats many of the arguments which that organization made in *Allen v. Illinois*, 478 U.S. 364 (1986), and which this Court plainly rejected. Although the APA now contends that *Allen* is different "because the petitioner was unquestionably in need of treatment for a psychosis and the State had disclaimed its punitive interest," Brief of APA at 7; *see also id.* at 16, it does not explain why those circumstances distinguish the Illinois statute that it unsuccessfully argued was criminal in character, not civil. *See* Brief for APA as *Amicus Curiae* in *Allen v. Illinois*, No. 85-5404. The APA's arguments are not strengthened by repetition in this case. *See* Brief of APA at 12-16.

B. Other Decisions Of This Court Further Confirm That *Allen v. Illinois* Is Dispositive

This Court recently reconfirmed in *United States v. Ursery*, 518 U.S. ___, 116 S. Ct. 2135 (1996), the correctness of the analysis it used in *Allen* and its applicability to the issues Hendricks raises in his conditional cross-petition. The Court in *Ursery* once again made clear that it will not lightly disregard a legislative determination – such as the Kansas Legislature made regarding the Kansas Act – that a statute should be classified as civil in nature. Rather, in order to justify ignoring such a legislative determination for constitutional purposes, the Court has required "the clearest proof" that the statutory scheme is so punitive either in purpose or effect as to negate any legislative declaration that the proceeding created is civil. *Ursery*, 116 S. Ct. at 2142, 2148, 2148 n. 3 (1996); *see also United States v. Ward*, 448 U.S. 242, 249 (1980). Thus, a legislature's designation of a statutorily created proceeding as *civil* "establishes a presumption that it is not" *punishment* for constitutional purposes. *Ursery*, 116 S. Ct. at 2148 n. 3.

The State agrees with Hendricks that, in determining whether a statute is civil or criminal for constitutional purposes, the Court consistently has utilized a two-step inquiry. *See* Brief for Cross-Petitioner 22. What Hendricks attempts to ignore, however, are the presumption and the high standard of proof which accompany that analysis, as *Ursery* recently reiterated. *Ursery* confirms that the first step of the analysis, as Hendricks acknowledges, Brief for Cross-Petitioner 22, is to ascertain whether the legislature intended the proceedings to be civil or criminal. 116 S. Ct.

at 2142, 2147. Hendricks concedes that the Kansas Legislature "affix[ed] a civil label to the proceeding" it created under the Act, Brief for Cross-Petitioner 22, a proposition amply confirmed both by the language of the Act itself and the probative legislative history, as discussed below. What Hendricks fails to acknowledge, however, is that this "establishes a presumption," *Ursery*, 116 S. Ct. at 2148 n. 3, that the Act is not criminal, and that Hendricks has the burden of establishing by the "clearest proof," *id.* at 2142, 2148, that proceedings under the Act "are so punitive in fact" that they must be deemed criminal for constitutional purposes. *Id.* at 2147.

In determining whether the party challenging the constitutionality of the statute has overcome the presumption by the clearest proof, this Court has not relied on any single feature or characteristic to identify a statute as civil or criminal for constitutional purposes. Rather, the Court has engaged in a wide-ranging inquiry that takes into consideration numerous factors, including – but not necessarily limited to – the following:

> [w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment – retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [all of which are] relevant to the inquiry, and may often point in differing

> directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (footnotes omitted). The determination obviously must be made from an objective viewpoint, not from the subjective viewpoint of the defendant who is likely to view any adverse consequences as "punitive" or "criminal" in nature. *See, e.g., Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 114 S. Ct. 1937, 1945 n. 14 (1994) ("whether a sanction constitutes punishment is not determined from the defendant's perspective").

Considering the Kansas Act in light of the *Mendoza-Martinez* factors, it is clear that the Act is not so punitive in effect as to establish by "the clearest proof" that it should be deemed criminal rather than civil for constitutional purposes. Commitment under the Act does result in the restraint of repeat sex offenders' liberty but Hendricks does not – indeed cannot – contend that the civil commitment of those with mental conditions for care and treatment historically has been viewed as punishment.

Blackstone expressed the opinion that detention for reasons other than conviction of a crime – such as pretrial detention and civil commitment – "is only for safe custody, and not for punishment." 4 W. Blackstone, *Commentaries on the Laws of England* *300. Although he disavowed any notion of punishing those whose crimes resulted from "madness," *id.* at *24, he warned that "they should not be permitted the liberty of acting unless under proper control; and in particular, they ought not to be suffered to

go loose, to the terror of the king's subjects." *Id.* at *25. Moreover, in earlier times, it apparently was not uncommon for the friends and relatives of those of "ill fame" or "not of good fame" to be required to post a bond sufficient to compensate others for any harm the person caused; in the absence of such a bond, the person remained in custody, essentially as a matter of preventive detention. *See, e.g., id.* at *256; *Ex parte Burford*, 7 U.S. (3 Cranch) 448 (1806) (Marshall, C.J.). Laws providing for the commitment of the " 'furiously mad,' those requiring immediate confinement in order to stop, or prevent, acts of violence," Nicholas N. Kittrie, *Compulsory Mental Treatment and the Requirements of "Due Process,"* 21 Ohio St. L. J. 28, 32 (1960), have been in existence in the States since at least 1788. *See* New York Laws ch. 31 (1788) (cited in Kittrie, *supra*, at 32 n. 12); *see also* Albert Deutsch, *The Mentally Ill in America* 419 (2d ed. 1949) ("the common law of the mother country [England] upheld the right to deprive insane persons of their liberty. Anyone could arrest a 'furiously insane' person, or one deemed 'dangerous to be permitted to be at large,' and confine him for the duration of his dangerous condition, provided that this were done in a humane manner.").

Persons committed under the Act are placed in the custody of the Department of Social and Rehabilitative Services, not the Department of Corrections, they are segregated from the inmate population, and their daily regimen is quite unlike that of convicted felons. The Act does not come into play only upon a finding of scienter or promote the traditional punitive goals of retribution and deterrence. Indeed, the State's case does not begin and end with proof of a criminal charge or conviction which,

rather, serves only the limited purpose of identifying those individuals potentially within the Act's scope. The State must further prove beyond a reasonable doubt that a person potentially subject to commitment both suffers from a mental abnormality or personality disorder and is dangerous to the community. Like the Illinois statute at issue in *Allen*, the Kansas Act provides for care and treatment (and permits commitment) only "until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large." Kan. Stat. Ann. § 59-29a07(a). For all of these reasons, and in light of the record evidence regarding the Act's purpose and effect discussed in the next section, Hendricks has failed to establish by "the clearest proof" that this Court must disregard the Act's presumptive label as a "civil" statute.

C. There Is No Proof, And Certainly Not The "Clearest Proof," That Either The Purpose Or Effect Of The Kansas Act Is Punitive

1. *Hendricks Offers No Probative Evidence That The Kansas Legislature Was Motivated By Punitive Intent*

Hendricks' description of the Act's "legislative history" is largely significant only for its irrelevance to the issues in this case. With the exception of his brief quotation from State Senator Vancrum – the Act's principal sponsor – *see* Brief for Cross-Petitioner 5, all of the "legislative history" Hendricks cites comes from the testimony and letters of non-legislators; not a single person whose views are expressed in those materials actually voted on the Act. *See id.* at 5-8, 27-29. If resort is to be had to the

legislative history in determining whether the Act has a punitive purpose, surely the statement of the Act's sponsor is more probative than the comments of law enforcement officials or mental health organizations.

Senator Vancrum, the sponsor of the Act, declared that it is intended "to protect our communities from those offenders who pose the greatest danger to society by providing for treatment and commitment of sexually violent predators until they are no longer a danger." J.A. 460. He observed that the Act is aimed at "the small number of habitual sex offenders who, because of their psychological makeup, pose an immediate danger to the public as soon as they are released from prison." *Id.* at 461. Senator Vancrum further stated that "real life tragedies" "are reason enough to pass this bill, to ensure that these few sex predators are provided treatment and not released back into society until they no longer pose a danger to the community." *Id.* at 462. He concluded his remarks by emphasizing that he believed the Act was constitutional under *Foucha v. Louisiana*, 504 U.S. 71 (1992), and this Court's other decisions addressing due process requirements for civil commitment, pointing out that "the bill does not serve any punitive goal. It is civil in nature. . . . " *Id.*

In any event, it is obvious that the Act may have more than one legitimate, non-punitive purpose. In the mental health context, there is not a strict legal dichotomy between statutes enacted for the purpose of *treatment* and statutes serving additional purposes, as Hendricks appears to suggest. This Court has never suggested that any purpose other than advancing the welfare of the person committed through treatment is *ipso facto*

punitive. Rather, as discussed more fully below, this Court has expressly recognized that *incapacitation* of dangerous mentally unstable individuals can be a legitimate regulatory, non-punitive, legislative purpose. *See, e.g., United States v. Salerno*, 481 U.S. 739, 748-49 (1987) ("We have also held that the government may detain mentally unstable individuals who present a danger to the public. . . . ") (citation omitted). Both the language and the legislative history of the Kansas Sexually Violent Predator Act can and should be read, as a whole, as demonstrating a legislative intent to serve the legitimate and non-punitive dual purposes of providing treatment to those sex offenders who desperately need it while incapacitating them so long as they remain dangerous to the community.

Citing *Romer v. Evans*, 517 U.S. ___, 116 S. Ct. 1620 (1996), Hendricks incorrectly asserts several times in his brief that this Court must blindly accept the apparent view of a plurality of the Kansas Supreme Court that the purpose of the Act " 'is to continue incarceration and not to provide treatment.' " Brief for Cross-Petitioner at 18, 25, 30 (citation omitted). There are several difficulties with Hendricks' deference argument in this case, all of which render his position ultimately untenable. First, the statement of the Kansas Supreme Court on which he relies appears to be a plurality opinion because it was endorsed by only three justices of that court, less than a majority. Second, the statement upon which he relies was made in the context of addressing only his substantive due process challenge. A majority of the Kansas Supreme Court did not address the issues presented in Hendricks' cross-petition. Thus, the Kansas Supreme Court was not

addressing the question whether the Act creates a civil or criminal proceeding for federal constitutional purposes.

Third, it would be inappropriate – for the constitutional purposes of determining whether the Act creates a civil or criminal proceeding – for this Court to defer to a state court's conclusion regarding legislative intent when legislative intent is the first step of the constitutional analysis this Court consistently has employed in this context. *See, e.g., United States v. Ursery*, 518 U.S. ___, 116 S. Ct. 2135, 2142, 2147 (1996). Unlike *Romer*, this is not a case where the scope and impact of the statute as a matter of state law is in issue and unclear on its face. The only issues here are federal constitutional ones, and this Court has ample basis for determining the statutory purpose of the Act for itself.

This case, therefore, is like *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), in which the Court found it inappropriate to defer to the Wisconsin Supreme Court's conclusion that a Wisconsin statute punished "bigoted thought and not conduct." *Id.* at 483. Acknowledging that the Court is "bound by a state court's construction of a state statute," *id.*, the Court pointed out that "here the Wisconsin Supreme Court did not, strictly speaking, construe the Wisconsin statute in the sense of defining the meaning of a particular statutory word or phrase. Rather, it merely characterized the 'practical effect' of the statute for [constitutional] purposes." *Id.* at 484. The Court held that the Wisconsin Supreme Court's assessment of "the *intent* and practical effect of the law," *id.* (emphasis added), "does not bind us." *Id.* Thus, the Court concluded that "we may form our own judgment as to [the statute's] operative effect." *Id.*

The question here is first whether the Kansas Legislature intended the Act to be civil or criminal. That determination is made for constitutional purposes and, therefore, involves a federal and not a state law question. This Court does not generally defer to state court determinations of federal questions. Moreover, the Kansas Supreme Court plurality ignored both the language of the statute itself, particularly § 59-29a01 (the preamble which states the legislature is creating a civil commitment process) and § 59-29a09 (requiring treatment), as well as the clear statements of the Act's sponsor, Senator Vancrum, who could not have made his view more clear that he intended the statute to create a civil proceeding. *See* J.A. 460-62. Nor is it self-evident that by its reference to "incarceration," the plurality meant to convey that the legislative intent was punitive; rather, the plurality was drawing a distinction between incapacitation and treatment in support of its substantive due process analysis. As further demonstrated below, this Court has recognized both *treatment* and *incapacitative* purposes as legitimate and distinct from any punitive interest of the State in the mental health context.

2. *Persons Committed Under The Act Are Receiving Treatment, As Required By The Act*

Hendricks would have this Court regard as uncontroverted fact his assertion that sex offenders committed under the Act are not receiving psychological treatment. *See, e.g.*, Brief for Cross-Petitioner 14, 19, 29. This assertion, however, is contradicted by the express factual findings made by two Kansas trial courts *after* hearing the testimony on which Hendricks relies – as well as much

additional testimony that Hendricks does not mention or cite. Indeed, Hendricks does not even mention these findings in his statement of the case. In denying Hendricks' motion for a new trial after a hearing during which various state officials testified, the trial court concluded that "the Secretary of Social and Rehabilitation Services has established a treatment program." J.A. 387. In a state *habeas corpus* proceeding Hendricks initiated the following year, a different trial judge again concluded – after hearing the testimony of various state officials – that "I have to conclude that the allegation that no treatment is being provided to any of the petitioners or other persons committed to the program designated as a sexual predator treatment program is not true. I find that they are receiving treatment." *Id.* at 453-54. In fact, that trial judge expressly found, among other things, that "it is clear that the physical facilties [sic] of a treatment program exist," that "some staff personnel exist," that "[s]ome treatment programs are in place," such as "group therapy" and "ward milieu," and that "the materials and instrumentalities of treatment are present." *Id.* at 453. To be sure, treatment programs under the Act are still evolving, but that does not mean that the State is not providing meaningful treatment.

3. *Persons Committed Under The Act Are Treated Very Differently From Offenders Serving Criminal Sentences*

Hendricks further asserts that persons committed under the Act are confined like criminal felons, citing bits of testimony from a single state official given in a pretrial proceeding in this case. *See* Brief for Cross-Petitioner 12,

19, 30. This case, of course, was the first one under the Kansas Act and, therefore, at the time of the testimony on which Hendricks relies, no one had been committed under the Act. The *only* testimony on which Hendricks apparently relies for his assertion is that of Terry Davis, an official of the Mental Health and Retardation Services section of the Kansas Department of Social and Rehabilitative Services. That agency is legally and functionally distinct from the Kansas Department of Corrections, and is the state agency statutorily charged with the care and treatment of those committed under the Act. Mr. Davis testified that he thought persons committed under the Act would be housed in the Larned Correctional Mental Health Facility and he described the conditions that he thought would exist. J.A. 57-81.

Hendricks correctly states that he was transferred from the Larned State Hospital to the Larned Correctional Mental Health Facility in February, 1995. *See* Brief for Cross-Petitioner 14; J.A. 425. The Larned Correctional Mental Health Facility is operated overall by Kansas correctional officials but it consists of five separate wings, like spokes on a wheel, with those committed under the Act housed and treated in the F-4 unit under the supervision of the Kansas Department of Social and Rehabilitative Services and separately from the inmate population, J.A. 77-78, 49-50, as is required by the Act. *See* Kan. Stat. Ann. § 59-29a07(a). The Larned Correctional Mental Health Facility does not house members of the general prison population – it is used for the treatment of inmates suffering from mental conditions – nor is the sex predator unit operated or staffed by the Department of Corrections.

At most, the testimony of Mr. Davis suggests that he anticipated persons committed under the Act might use some of the same physical facilities and would receive food, laundry and non-psychological medical services from the same source – the Larned State Hospital, J.A. 79-80 – as inmates receiving mental treatment at the Larned facility. He made clear, however, that sex predators committed under the Act generally would be segregated from inmates receiving mental treatment, *id.* at 57, 59-60, and that the predator unit would be staffed by the Department of Social and Rehabilitative Services, not the Department of Corrections. *Id.* at 57, 64-65. He further testified that those committed under the Act generally would be accorded the same rights as any involuntarily committed mental patient in a state mental institution, *id.* at 50-51, including the right to wear their own clothes, to keep personal items such as toiletries, to keep and spend money, to make and receive telephone calls, to receive visitors each day, to refuse to work, to be paid for any work they do agree to perform, and to have their own rooms. *Id.* at 52-56. There is *no* evidence in the record that persons committed under the Act *actually* are being incarcerated under the same rules and conditions either as felons in the general Kansas prison population or even the inmates receiving mental health treatment at the Larned Correctional Mental Health Facility.

In any event, any such challenge to the implementation of the Act would have to be brought as an action seeking to compel the State to comply with the Act's treatment requirements; questions regarding the nature of the Kansas treatment program do not form a legal basis for seeking to declare the Act unconstitutional, as

Hendricks – and several of his *amici* – ask the Court to do in this case. The Court expressly rejected this approach in *Reno v. Flores*, 507 U.S. 292 (1993), in which the Court upheld a federal regulation permitting the continued governmental custody of alien juveniles against a facial challenge based on substantive due process grounds. Pertinent to the misplaced arguments of Hendricks and his *amici* regarding the nature and conditions of the Kansas treatment program, the Court declared:

> Respondents spend much time, and their *amici* even more, condemning the conditions under which some alien juveniles are held, *alleging that the conditions are so severe as to belie the Service's stated reasons for retaining custody – leading, presumably, to the conclusion that the retention of custody is an unconstitutional infliction of punishment without trial.* But whatever those conditions might have been when this litigation began, they are now (at least in the Western Region, where all members of the respondents' class are held) presumably in compliance with the extensive requirements set forth in the Juvenile Care Agreement that settled respondents' claims regarding detention conditions. The settlement agreement entitles respondents to enforce compliance with those requirements in the District Court, which they acknowledge they have not done. We will disregard the effort to reopen those settled claims by alleging, for purposes of the challenges to the regulation, that the detention conditions are other than what the consent decree says they must be.

Id. at 301 (emphasis added). The Court's holding in *Flores* applies with equal force in this case. As previously noted, the Kansas Act expressly requires and emphasizes that

the "commitment of persons under this Act shall conform to constitutional requirements for care and treatment." Kan. Stat. Ann. § 59-29a09. Thus, if Hendricks and his *amici* truly believe that the Kansas treatment program is constitutionally inadequate, their remedy is to file suit seeking to compel compliance with constitutional treatment requirements. A naked allegation – completely unsubstantiated on the record in this case by either Hendricks or his *amici* – that a State is not complying with statutory or constitutional obligations in implementing a statute simply provides no basis for declaring the statute itself unconstitutional.

D. Incapacitation Is A Legitimate, Non-Punitive Governmental Purpose

Hendricks apparently takes the position that *any* confinement which is even in part for the purpose of incapacitation is *per se* punishment for constitutional purposes. *See* Brief for Cross-Petitioner 31-33. The Court strongly rejected that proposition in *United States v. Salerno*, 481 U.S. 739 (1987), a case that Hendricks neither mentions nor cites in his brief. In *Salerno*, the Court expressly addressed and rejected the argument that pretrial detention pursuant to the Bail Reform Act necessarily constituted "punishment" for constitutional purposes. The Court began by observing that "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment." *Id.* at 746. Rather, the Court examined congressional intent and the reasons for the confinement. *Id.* at 747. In so doing, the Court pointed out that "[t]here is no

doubt that preventing danger to the community is a legitimate regulatory goal." *Id.* The Court noted that the Bail Reform Act required "that detainees be housed in a 'facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal.' " *Id.* at 748 (quoting 18 U.S.C. § 3142(i)(2)). The Court thus concluded "that the pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause." *Id.*

The Court went on to reject the proposition that an incapacitation purpose is never constitutionally sufficient to justify confinement of an individual:

> We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. For example, in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous. Even outside the exigencies of war, we have found that sufficiently compelling governmental interests can justify detention of dangerous persons. Thus, we have found no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings. We have also held that the *government may detain mentally unstable individuals who present a danger to the public,* and dangerous defendants who become incompetent to stand trial.

Id. at 748-49 (emphasis added) (citations omitted).

Hendricks relies on this Court's decision in *Specht v. Patterson*, 386 U.S. 605 (1967), as holding that commitment for an incapacitation purpose in the circumstances presented here is "criminal punishment." Brief for Cross-Petitioner 32. Hendricks' reading of *Specht*, however, is inconsistent with this Court's decisions in *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940), and *Allen v. Illinois*, 478 U.S. 364 (1986). Although Justice Douglas' opinion for the Court in *Specht* indeed characterized confinement under the Colorado Sex Offenders Act at issue in that case as "criminal punishment," 386 U.S. at 608, the Court was not addressing double jeopardy or *ex post facto* issues. Rather, the case turned on a procedural due process issue – in particular whether a judicial hearing was required prior to commitment – with the Court holding that "[d]ue process, in other words, requires that [the person] be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own." *Id.* at 610. The Court took pains to express its view that "[t]he case is therefore quite unlike the Minnesota statute we considered in *Minnesota v. Probate Court*, 309 U.S. 270, where in a proceeding to have a person adjudged a 'psychopathic personality' there was a hearing where he was represented by counsel and could compel the production of witnesses on his behalf." *Id.* (footnote omitted). The Court further distinguished the Minnesota statute by pointing out that "[a] person found to have a 'psychopathic personality' would be committed, just as a person found to be insane." *Id.* n. 3.

In *Allen v. Illinois*, this Court explicitly rejected the argument that the Illinois Sexually Dangerous Persons

Act -- which substantively is virtually indistinguishable from the Colorado Sex Offenders Act at issue in *Specht* – constituted a "criminal" proceeding necessitating the application of criminal procedure protections such as the constitutional privilege against self-incrimination. That holding in *Allen* appears irreconcilable with Justice Douglas' statement in *Specht* that the Colorado proceeding constituted "criminal punishment." Although neither the majority nor the dissent in *Allen* cites or mentions *Specht*, it appears relatively clear that the Court rejected the proposition for which Hendricks now cites *Specht*. *See* Brief for Cross-Petitioner 32. The reading that harmonizes *Specht* with *Pearson* and *Allen* is that the critical factor in *Specht* was not whether the proceeding at issue was criminal or civil but, rather, that it involved a significant deprivation of liberty and therefore implicated procedural due process protections. That reading explains both why the sexual psychopath statute in *Pearson* easily passed constitutional muster and why the Illinois statute in *Allen* was not "criminal" in nature.

If detention that is in any part for the purpose of incapacitation necessarily constituted punishment, then all involuntary civil commitments would be "punishment" for constitutional purposes. Indeed, that proposition would necessarily follow from the rule of *O'Connor v. Donaldson*, 422 U.S. 563 (1975), that persons must present a danger to themselves or others before they may be involuntarily committed. This Court has never suggested that incapacitation, especially when coupled with the *parens patriae* objective of treatment for mental conditions, necessarily constitutes punishment for constitutional purposes. Indeed, the Court in *Allen* recognized the States'

"police power to protect the community from the dangerous tendencies of some who are mentally ill," and held that "Illinois' decision to supplement its *parens patriae* concerns with measures to protect the welfare and safety of other citizens does not render the Act punitive." 478 U.S. at 373.[6]

II. THE KANSAS ACT DOES NOT VIOLATE DOUBLE JEOPARDY PRINCIPLES EITHER ON ITS FACE OR AS APPLIED TO HENDRICKS IN THIS CASE

Hendricks contends that the Act violates constitutional double jeopardy principles. *See* Brief for Cross-Petitioner 38-44. Obviously, a conclusion that the Kansas Act is civil in nature, and not criminal, eliminates

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[6] Hendricks' repeated statements that he has no mental illness requiring treatment, *e.g.*, Brief for Cross-Petitioner 2, 13, are contrary to the record. At most, the evidence in the record suggests that Hendricks is not "mentally ill" as that term is used in the traditional Kansas civil commitment statute, Kan. Stat. Ann. § 59-2902(h), which defines a "mentally ill person" as one who suffers from a severe mental disorder to the extent that treatment is necessary, lacks the capacity to make an informed treatment decision and is likely to cause harm to self or others. At Hendricks' sexual predator hearing, Dr. Befort, the chief psychologist at a major state mental hospital in Kansas with many years experience, testified that Hendricks is a dangerous pedophile with a "mental abnormality," J.A. 229-33, 247-48, 272, even if he does not have a personality disorder or satisfy the traditional civil commitment definition of a "mentally ill person." *Id.* at 256, 268, 277. Dr. Befort did not testify that Hendricks was mentally normal in any clinical or medical sense. Indeed, the dissenting justices of the Kansas Supreme Court aptly observed that "a person subject to the Act could hardly be considered to be mentally healthy." Pet. App. 28a.

Hendricks' claim that the Act violates constitutional double jeopardy principles. Furthermore, this Court recently declared that a practice – such as *in rem* civil forfeiture – which historically has not been considered punitive or criminal in nature, does not constitute "punishment" for double jeopardy purposes under the Constitution. *See United States v. Ursery*, 518 U.S. ___, 116 S. Ct. 2135 (1996). For the same reason, involuntary civil commitments – which historically have been justified on many grounds and utilized for many legitimate, non-punitive purposes, including treatment and incapacitation – have never been designated or considered criminal proceedings nor viewed as imposing "punishment" for constitutional purposes. Thus, so long as a civil commitment system satisfies constitutional substantive and procedural due process requirements, *see* Brief of Petitioner (No. 95-1649), there should be no question that such a system does not impose "punishment" for purposes of the Double Jeopardy Clause or other constitutional criminal procedure protections.

The Fifth Amendment's double jeopardy prohibition, as applied to the States by virtue of the Fourteenth Amendment's Due Process Clause, has been interpreted by this Court to reach the following three types of situations: (1) a second prosecution for the same offense following an acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.[7] *Ursery*, 116 S. Ct. at 2139; *id.* at 2149

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[7] Justices Scalia and Thomas take the position that "the Double Jeopardy Clause prohibits successive prosecution, not successive punishment." *See, e.g., Ursery*, 116 S. Ct. at 2152 (Scalia, J., joined by Thomas, J., concurring in the judgment).

(Kennedy, J., concurring). The first category is not implicated in this case because Hendricks has not been acquitted of any criminal offense.

The second category is implicated in this case only if the sexual predator commitment proceeding constitutes a second prosecution for the same offense of which Hendricks previously was convicted. Although there certainly is some overlap in terms of the evidence supporting both Hendricks' numerous prior convictions and the sexual predator proceeding, the latter proceeding clearly did not constitute a second prosecution for offenses previously adjudicated. Under the Act, Hendricks' previous convictions are relevant only to the questions of his current mental condition and dangerousness.

Hendricks makes a misguided attempt to invoke the "same elements" test of *Blockburger v. United States*, 284 U.S. 299 (1932), in this context. As Justice Kennedy observed in his concurring opinion in *Ursery*, however, outside of the successive prosecution context, "*Blockburger* is a misfit. . . . " 116 S. Ct. at 2151. A proceeding under the Act simply does not define an "offense," the elements of which can be compared to the elements of offenses for which a sex offender previously has been convicted. Hendricks does not, and indeed could not, plausibly suggest that a person convicted of a crime whom the State subsequently sought to commit under the traditional civil commitment statute would be subjected to successive prosecutions for the same offense in violation of double jeopardy principles. The second proceeding simply is not a prosecution because civil commitment

statutes do not define "offenses."[8] In any event, even were the Court to accept Hendricks' invitation to view this as a *Blockburger* situation, the outcome would not change. As this Court recognized in *Specht v. Patterson*, 386 U.S. at 608, a civil commitment proceeding triggered by the commission of a crime is not a successive prosecution for the same offense:

> The Sex Offenders Act does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. That is a new finding of fact that was not an ingredient of the offense charged. [citation omitted].

The third category of double jeopardy protection – the prohibition on multiple punishments for the same offense – can in rare circumstances arise even in the context of proceedings which a legislature has designated

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[8] For the same reasons, Hendricks' discussion of "the analogous case of *Breed v. Jones*, 421 U.S. 519, 529 (1975)," Brief for Cross-Petitioner 39, is misplaced. In *Breed*, the Court found a double jeopardy violation when a juvenile was adjudicated in juvenile court proceedings as having committed armed robbery and then was transferred to the adult criminal justice system and tried again for the same offense. Unlike this case, the Court pointed out in *Breed* that there was "no dispute that the petition filed in Juvenile Court and the information filed in Superior Court related to the 'same offence.' " *Id.* at 527. Moreover, the Court emphasized that "we have held that the risk to which the Clause refers is not present in proceedings that are not 'essentially criminal.' " *Id.* at 528 (quoting *Helvering v. Mitchell*, 303 U.S. 391, 398 (1938)).

as "civil." This Court has indicated that an *in personam* civil monetary penalty or a tax which is triggered only by the commission of criminal conduct and which is vastly disproportionate to the harm caused may constitute "punishment" for double jeopardy purposes. *See, e.g., United States v. Halper*, 490 U.S. 435, 448 (1989); *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994). The Court recently clarified, however, that *Halper* and *Kurth Ranch* represent the rare case, and are not to be read as creating sweeping rules that invalidate a host of civil proceedings on the ground that they violate double jeopardy. *See Ursery*, 116 S. Ct. at 2144-47. In particular, the Court specifically rejected the argument that *Halper* created "a general rule" that any civil sanction which " 'cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment.' " *Id.* at 2145 n. 2 (quoting *id.* at 2156 (Stevens, J., dissenting)). Indeed, the Court observed that

> If the "general rule" of Justice STEVENS were applied literally, then virtually every sanction would be declared to be a punishment: it is hard to imagine a sanction that has no punitive aspect whatsoever. Justice STEVENS' interpretation of *Halper* is both contrary to the decision itself and would create an unworkable rule inconsistent with well-established precedent.

Id. As demonstrated in the preceding section, the Kansas Act – which does not impose a civil "sanction" of any type – clearly was intended to and does serve the important, non-punitive goals of treatment and incapacitation. Thus, for the reasons previously set forth, Kansas' civil

sex predator commitment statute does not impose "punishment" within the meaning of this Court's recent double jeopardy decisions.

III. THE KANSAS ACT DOES NOT VIOLATE *EX POST FACTO* PRINCIPLES EITHER ON ITS FACE OR AS APPLIED TO HENDRICKS IN THIS CASE

The conclusion that the Kansas Act is civil in nature, and not criminal, also eliminates Hendricks' claim that the Act violates constitutional *ex post facto* principles. *See* Brief for Cross-Petitioner 36-38. "Although the Latin phrase '*ex post facto*' literally encompasses any law passed 'after the fact,' it has long been recognized by this Court that the constitutional prohibition on *ex post facto* laws applies only to *penal* statutes which disadvantage the offender affected by them." *Collins v. Youngblood*, 497 U.S. 37, 41 (1990) (emphasis added). For constitutional purposes, an *ex post facto* law which Article I, § 10 prohibits the States from enacting[9] is one that (1) punishes as a crime conduct that was not criminal when committed, (2) retroactively increases the punishment for a crime after its commission or (3) deprives a defendant of a legal defense that was available at the time the crime was

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[9] Hendricks presumably means to challenge the Act under the *ex post facto* prohibition of Article I, § 10, which applies to the States, rather than the prohibition of Article I, § 9, cl. 3, which he cites in his brief, *see* Brief for Cross-Petitioner 36, but which applies to Congress, not the States. *See also* John E. Nowak & Ronald D. Rotunda, *Constitutional Law* 428 (5th ed. 1995) ("The Constitution contains two *ex post facto* clauses: one that applies to the states and one that applies to the federal government.") (citations omitted).

committed. *Id.* at 42. Because the Kansas Sexually Violent Predator Act plainly does not criminalize conduct legal before its enactment nor deprive Hendricks of any defense that was available to him at the time of his crimes, the Act cannot offend those two *ex post facto* prohibitions.

Hendricks states that "[o]ne purpose of the clause is to restrain legislatures from enacting arbitrary, vindictive or oppressive legislation," Brief for Cross-Petitioner 37, and goes on to assert that the Act violates *ex post facto* principles because it represents "vindictiveness against the ever unpopular class of sex offenders." *Id.* Any attempt to read such extraordinary breadth into the prohibition must fail, as this Court made clear in *Collins v. Youngblood*, 497 U.S. 37 (1990). In *Collins*, the Court emphasized that the constitutional prohibition applies only to state legislation that falls within one of the three specific categories identified above. *Id.* at 45-46. Indeed, the Court expressly overruled two previous decisions which suggested a broader and more ambiguous scope for the Clause. *Id.* at 47-52.

Thus, Hendricks' *ex post facto* challenge, like his double jeopardy challenge, reduces to the question whether Kansas has attempted to apply a " 'new punitive measure to a crime already consummated.' " *California Dep't of Corrections v. Morales*, 514 U.S. ___, 115 S. Ct. 1597, 1601 (1995) (citation omitted). In other words, the question is whether the Act imposes criminal punishment which, in this instance, Hendricks would have to argue would fall within the second category of prohibited state *ex post facto*

legislation. For the reasons stated above, the Kansas statute is neither "criminal" nor imposes "punishment."[10] Thus, like his double jeopardy claim, Hendricks' *ex post facto* claim must fail.

IV. THE KANSAS ACT DOES NOT VIOLATE EQUAL PROTECTION PRINCIPLES

A. Hendricks Has Abandoned His Equal Protection Claim In This Court

"A question set forth in a petition or jurisdictional statement will be considered abandoned if not reiterated and argued in the brief on the merits once review has been granted." Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* 544 (7th ed. 1993). Hendricks raised an equal protection challenge as the fourth Question Presented in his conditional cross-petition (*Hendricks v. State*, No. 95-9075). Hendricks has abandoned that claim, however, by failing to include any discussion of it in his opening brief on the merits. Hendricks' only explanation for his omission of the equal protection claim from his opening

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[10] This Court has not identified a particular or distinct test for determining whether a legislative measure constitutes "punishment" for purposes of applying the constitutional *ex post facto* prohibitions. Hendricks does not contend that his claims that the Act is "criminal," violates double jeopardy principles and violates *ex post facto* principles turn on potentially different tests or notions of what constitutes "punishment," and neither does Kansas. Rather, these three claims fail across the board because the Kansas Act neither creates a "criminal" proceeding nor imposes "punishment" as the Court has explained those concepts in prior decisions.

brief on the merits is that the "claim will be subsumed in his substantive due process argument, and will not be separately briefed." Brief for Cross-Petitioner 2 n. 1.

The Court should not condone this apparent attempt either to evade the page limits of Supreme Court Rule 33.1(g) or to manipulate the briefing process in order to cause the State either to address first – or wait until its final reply brief to address – the equal protection issue which Hendricks alone raised and sought review of in this Court. Hendricks' only explanation for this tactic, that the equal protection claim is "subsumed" in the substantive due process claim, lacks merit for obvious reasons. Although Hendricks and the State briefed and argued the equal protection issues in the Kansas Supreme Court, a majority of the justices of that court did not address or comment on equal protection even though they expressly ruled on Hendricks' substantive due process claim. Furthermore, if the equal protection issue was fairly "subsumed" within the substantive due process issues which the State raised in its petition for a writ of certiorari in *State v. Hendricks*, No. 95-1649, then there was no reason for Hendricks to raise the issue separately in his conditional cross-petition. For these reasons, the State respectfully requests that the Court hold that Hendricks has abandoned his equal protection claim. *See, e.g., New Haven Inclusion Cases*, 399 U.S. 392, 480 n. 78 (1970); *Russell v. United States*, 369 U.S. 749, 754 n. 7 (1962).

B. In Any Event, Hendricks' Equal Protection Claim Has No Merit

1. *Rational Basis Review Applies To Hendricks' Equal Protection Claim Because The Act Neither Infringes On A Fundamental Right Nor Draws A Suspect Classification*

Statutes properly enacted by state legislatures are presumed constitutional, *Heller v. Doe*, 509 U.S. 312, 319 (1993), unless they involve either fundamental rights or suspect classifications. *Id.*; *see also City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). This Court long has recognized that classifications involving sexual offenders need only satisfy rational basis review. In *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940), for example, the Court easily rejected an equal protection challenge to a Minnesota sexual psychopath statute which singled out repeat sex offenders for a distinct civil commitment process. In so doing, the Court made clear that the applicable test for equal protection purposes is rational basis review: "The question, however, is whether the legislature could constitutionally make a class of the group it did select. That is, whether there is any rational basis for such a selection." *Id.* at 274.

The Court consistently has applied rational basis review in subsequent equal protection cases involving classifications based on mental conditions. *Heller v. Doe*, 509 U.S. 312, 321 (1993) ("We have applied rational-basis review in previous cases involving the mentally retarded and the mentally ill."). In *Heller*, the Court applied rational basis review in upholding Kentucky's use of different statutory civil commitment procedures for mentally

retarded as opposed to mentally ill persons.[11] In so doing, the Court cited two of its prior decisions for the proposition that rational basis review applies in such circumstances: *City of Cleburne*, which rejected an equal protection challenge to a municipal ordinance that restricted the locations in which group homes for the mentally retarded could be operated, and *Schweiker v. Wilson*, 450 U.S. 221 (1981), which rejected an equal protection challenge to a federal funding scheme that denied certain funds to residents of public mental institutions.

Distinctions drawn on the basis of mental illness simply are not "suspect" under this Court's cases. Similarly, as explained in the State's opening brief in this case on the substantive due process issues, the Kansas Act does not implicate fundamental rights. *See* Brief of Petitioner (No. 95-1649) at 25-28. Rather, this Court's prior decisions unquestionably establish that rational basis review applies to Hendricks' equal protection claim.

2. *The Act Easily Passes Rational Basis Review*

The initial step in evaluating an equal protection challenge under rational basis review is to determine whether the classification which includes the person challenging it excludes other persons who are similarly situated to the challenger, and is therefore even potentially

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[11] The parties in *Heller* apparently had agreed throughout the lower court proceedings that rational basis review was the appropriate level of review, and so this Court also applied that standard without deciding whether it was the proper level of review. 509 U.S. at 318-19.

subject to a charge of arbitrariness or irrationality. In his conditional cross-petition (at 17), Hendricks suggested that sexually violent predators are similarly situated to two other groups which the Kansas Act does not reach: (1) other inmates who are approaching the end of their terms of imprisonment and (2) other persons subject to commitment under the traditional Kansas civil commitment statute. Neither group, however, is similarly situated to the sex offenders subject to the Act.

On the contrary, neither the larger group of all inmates approaching their release dates nor all those who may be subject to the traditional Kansas civil commitment statute have the kinds of mental conditions, the specific histories of sexual violence, the propensities to commit future acts of sexual violence, or the particular long-term care and treatment needs that characterize sex offenders subject to commitment under the Act. The dissenting justices of the Kansas Supreme Court – who addressed and rejected Hendricks' equal protection claim – correctly observed that "[a]ll members of the class of persons of which Hendricks is a part are subject to treatment identical to that which he has received." Pet. App. 48a. The dissenters further concluded that "[n]one of the groups Hendricks compares to sexually violent predators are similarly situated for the limited and narrow purpose of the Act." *Id.*

Even assuming that sexually violent predators are similarly situated to the two other groups Hendricks identified in his conditional cross-petition, the different treatment they receive under the Act easily satisfies the rational basis test. Rational basis review " 'is not a license for courts to judge the wisdom, fairness, or logic of

legislative choices.' " *Heller*, 509 U.S. at 319 (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). "[A] classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Id.* at 320. Moreover, the classification must be upheld if there is " 'any reasonably conceivable state of facts that could provide a rational basis for the classification.' " *Id.* (quoting *Beach Communications*, 508 U.S. at 313). The State is not required "to produce evidence to sustain the rationality of a statutory classification," *id.*, but, rather, the "statute is presumed constitutional, and '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.' " *Id.* (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

Hendricks asserted in his conditional cross-petition (at 17) that the Act violates equal protection because it does not extend to other prisoners who, unlike sexually violent predators, are released from imprisonment after their prison terms end. Surely it is rational for Kansas to decide to treat specially that subset of its prison population which has mental abnormalities or personality disorders which make the offenders likely to commit future acts of sexual violence unless committed and treated. This Court recognized more than fifty years ago in a virtually identical context that

> Whether the legislature could have gone farther is not the question. The class it did select is identified by the state court in terms which clearly show that the persons within that class

> constitute a dangerous element in the community which the legislature in its discretion could put under appropriate control. As we have often said, the legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. If the law "presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied."

Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 274-75 (1940) (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911)).

Hendricks also asserted in his conditional cross-petition (at 18-19) that the Act violates equal protection because certain of its procedures differ from those operative under the traditional Kansas civil commitment statute. Although there are indeed some procedural differences between the two statutes, the most significant one – the requirement under the Act that the State satisfy the substantive standards by proof beyond a reasonable doubt, *see* Kan. Stat. Ann. § 59-29a07 – actually exceeds constitutional requirements and provides greater protection to sexually violent predators than to those subject to commitment under the traditional statute, which requires only proof by clear and convincing evidence. *See* § 59-2917(f). None of the other procedural differences between these statutes is significant. For example, although the specific release procedures and time periods vary somewhat, both statutes require regular reviews of the committed person's status. *See* §§ 59-2919a, 59-29a08. Indeed, given the acknowledged long-term treatment requirements of violent sexual offenders, the difference

between semi-annual and annual review is neither irrational nor significant.

Under the Act, a person has the right to an attorney during the annual review hearing (but not the right to be present) for the purpose of determining whether there is probable cause to believe the person is no longer dangerous or no longer suffers from a mental abnormality. § 59-29a08. If the court determines there is probable cause to believe either of those circumstances has changed, then the person is entitled to a full hearing on the issues, including decision by a jury, with the person present and represented by counsel and the burden of proof (beyond a reasonable doubt) on the State. *Id.* Under the Act, a committed person may file review petitions at any time. *See* § 59-29a11 ("Nothing in this act shall prohibit a person from filing a petition for discharge pursuant to this act."). Moreover, the Act emphasizes that commitment "shall conform to constitutional requirements for care and treatment." § 59-29a09. In sum, this case simply does not present a situation in which those committed under the Act are deprived of any fundamental procedural protections which are available to persons committed under the traditional Kansas civil commitment statute.

Baxstrom v. Herold, 383 U.S. 107 (1966), which Hendricks cited in his conditional cross-petition (at 18), is not to the contrary. In *Baxstrom*, an inmate who became or was diagnosed as mentally ill during a term of imprisonment could be civilly committed at the expiration of the criminal sentence without any formal judicial hearing or judicial determination that the inmate was both dangerous and mentally ill. *Id.* at 110-11. The Court held that,

with respect to the particular procedural rights at issue – jury review of the mental illness determination and judicial determination of dangerousness – "there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." *Id.* at 111-12. The Court recognized, however, that it would be rational to distinguish between dangerous, mentally ill inmates and other civil committees for purposes of "determining the type of custodial or medical care to be given." *Id.* at 111.

Any of the minor procedural differences between the Kansas Sexually Violent Predator Act and the traditional Kansas civil commitment statute either work to the benefit of sex offenders – by providing them greater protection – or are related to the different nature and length of the care and treatment they require. Under the Act, unlike in *Baxstrom*, sex offenders subject to commitment always receive either a jury or judicial determination that they are both dangerous and suffer from a mental abnormality or personality disorder prior to being committed. In such proceedings, they have the assistance of counsel and an expert witness, and the State must meet its burden of proving the substantive standards by proof beyond a reasonable doubt. Thus, the minor differences present in this case are a far cry from the difference in fundamental procedural rights that was at issue in *Baxstrom*.

It was plainly rational for the Kansas Legislature to conclude that persons suffering from mental abnormalities who commit sexually violent offenses and are likely to repeat such offenses in the future merit special treatment. The Legislature rationally could conclude that

such sex offenders present a greater danger to the community than other offenders or persons subject to civil commitment, that they cause enormous harm to society, that they have a significant likelihood of recidivism, and that they require specialized treatment programs in order to reduce that recidivism. For all of these reasons, the Act easily passes rational basis review. *See Heller*, 509 U.S. at 328 (differences in difficulty of diagnosis, accuracy of dangerousness predictions, and the nature of the treatment required all were sufficient justifications for differential treatment of the mentally retarded and the mentally ill). The Equal Protection Clause does not require Kansas to prove that its legislative judgments are undebatable or absolutely "correct" in some sense, only that they are rational. *Id.* at 326.

Even if this Court were to determine that strict scrutiny is the appropriate level of review to apply to the Kansas statute in evaluating Hendricks' equal protection claim, the outcome would remain the same for the reasons stated at pages 47-49 of the Brief of Petitioner (No. 95-1649).

CONCLUSION

For the foregoing reasons, Cross-Respondent State of Kansas respectfully requests that this Court hold that the Kansas Sexually Violent Predator Act creates a civil, not a criminal, proceeding, and does not violate Hendricks' double jeopardy, *ex post facto* or equal protection rights.

Respectfully submitted,

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September 6, 1996